

**IN THE COURT OF
APPEAL AT
NAKURU**

**(CORAM: WARSAME, JAMILA MOHAMMED & GACHOKA,
JJ.A.)**

**CIVIL APPEAL NO. 83 OF 2019
(FORMERLY CIVIL APPEAL NO. 269 OF
2019)**

BETWEEN

**STEPHEN NJUGUNA KIRAGU.....1ST APPELLANT
JANE WANDIA KIIRU (Suing as the administrator of the
estate of HERMAN NGARI KIRIKA.....2ND
APPELLANT**

AND

KENYA NATIONAL HIGHWAYS AUTHORITY... RESPONDENT

*(An appeal from the judgment and decree of the
Environment and Land Court of Kenya at Nakuru (S.
Munyao, J.) delivered on 15th November 2018*

in

ELC No. 73 of 2018)

JUDGMENT OF THE COURT

1. The Kenya Roads (Kenya National Highways Authority) General Regulations, 2025 interpret a road reserve to mean the full width of a public road designated for current or future road development. It falls within the mandate of the respondent, in its management and control. In the dispute before us, the

appellants' buildings were demolished by the respondent on the ground that part of the structures had encroached on the road reserve. The main issue

for determination that befell the trial Court and is before us is the lawfulness or otherwise of that action.

2. To contextualize the appeal we shall give a summary of the evidence before the trial Court, albeit in a summary way. By plaint amended on 8th May 2018, the appellants averred that the 1st appellant was the registered owner of the following parcels of land: NJORO/NGATA BLOCK 1/3141 & NJORO/NGATA BLOCK 1/3142 that mutated into the following parcels: NJORO/NGATA BLOCK 1/6913, NJORO/NGATA BLOCK 1/6912, NJORO/NGATA BLOCK 1/6911, NJORO/NGATA BLOCK 1/6909 and NJORO/NGATA BLOCK 1/6906. It was further averred that the deceased 2nd appellant was the registered proprietor of all that parcel of land namely NJORO/NGATA BLOCK 1/6910. The main issue for trial was that on 8th February 2018, the respondent, without any color of right, prior notice or prior earmarking, gained access to the suit premises and demolished the wall fence and servant quarters built therein.
3. The appellants lamented that the demolished structures had been approved by government agencies and therefore suffered loss and

damage. Further, the actions of the respondent on the appellants' properties violated a lease agreement the appellants had entered with third parties. Particularizing the acts of illegality by the respondent and special damages, the appellants prayed for a declaration that the actions of the respondent of demolishing the structures on the suit properties were illegal and unlawful; a permanent injunction restraining the respondent from further interfering, trespassing, demolishing, wasting and/or alienating the suit parcels of land, special damages as itemized in paragraph 10 of the plaint, general damages for trespass and costs of the suit with interest.

4. The respondent entered appearance on 6th April 2018. It filed its statement of defence and counterclaim amended on 11th June 2018. It denied each and every allegation set out in the plaint. In its counterclaim, the respondent averred that the appellants illegally encroached onto the road reserve abutting the former B4, of 36.58 metres (120 ft). It accused the appellants of illegally constructing structures on the road reserve without its approval.

5. According to the respondent, the appellants must have illegally obtained their titles and particularized the allegations of those illegalities. On account of the appellants' actions, it averred that it had suffered loss and damage to expend significant sums of taxpayers' money to cure illegalities perpetuated by them. Further, the respondent averred that it continued to suffer loss and damage in delayed projects throughout the country and huge sums billed by contractors as liquidated damages for delays occasioned by road reserve encroachments.
6. In its counterclaim, the respondent sought the following reliefs: a declaration that the appellants encroached onto the road reserve measuring 60 metres on NJORO/NGATA BLOCK 1 (KIAMUNYI); the appellants be directed to demolish and remove all structures, debris and materials on the suit property at their own cost within seven days; a mandatory injunction against the appellants be issued ordering their vacation and demolition of all structures erected on all that road reserve measuring 60 metres from the suit premises; a permanent injunction restraining the appellants from

interfering with the road reserve; mesne profits for trespass since April 2015 plus interest and; costs.

7. In his judgment dated 15th November 2018, *Munyao, J.* found that the appellant's case was unmerited and dismissed it with costs to the respondent, whose counterclaim was allowed. We shall recite verbatim, the salient parts of the judgement as follows:

***“... it will be seen that it is the cadastral map which is used to indicate the approximate position of the boundaries. Under Section 22 (2) above, when a land owner moves to subdivide his land, he needs to authenticate his subdivisions by use of the cadastral map. Now, the 1st plaintiff does not pretend that he used the cadastral map when he proceeded to commission the subdivision of his original two parcels of land. In fact, the surveyor, who he employed, used the RIM. It follows that when the subdivision was done, it was done without the benefit of the actual coordinates which set out the boundaries of the road and of contiguous land. That aside, and even without the benefit of the cadastral map, the RIM clearly shows that the road reserve is of 60 metres. When the surveyor did the subdivision of the land of the 1st plaintiff, he ought to have measured this road reserve, which was clear in the RIM, and what he would have discovered is that the road reserve is 60 metres. I indeed wonder where PW-2 got the idea that the road reserve is 40 metres. It is nowhere in either the RIM or the Cadastral map, which are the only two authentic maps that could have pointed out the extent of the road reserve.*”**

PW-3 himself confirmed that the RIM shows that the road reserve is 60 metres. He however lamented that when the RIM was drawn, it did not follow the actual ground

measurments (sic), which according to him would have shown a reserve of 40 metres. I am afraid that I am unable to buy this argument. The cadastral plan was drawn in the year 1953, and has not been changed. The RIM simply followed what was in the cadastral plan; it did not change anything. Now, does PW-2 seek to say that in the year 1953, the suit properties had already been developed and thus the cadastral map did not take these into account? Clearly not. His argument that the RIM does not follow the ground position falls flat on its face. The plaintiffs have in fact not tendered before me any evidence that the road reserve is 40 metres as they allege. All the evidence I have point only to one conclusion; that the road reserve is 60 metres and not 40 metres. It is thus apparent that the developments in issue have encroached by about 10 metres into the road reserve."

8. The appellants are aggrieved by those findings. They filed their notice of appeal dated 19th November 2018. They subsequently filed their amended memorandum of appeal dated 26th May 2025 that raised a prolix fourteen grounds disputing the findings of the learned judge. We have taken the liberty to summarize those grounds as follows: that the trial court failed to appreciate sanctity and indefeasibility of title under section 26 of the Land Registration Act thereby creating a *lacuna* on the sanctity of the appellants' titles; that the learned judge issued declaratory orders without appreciating that the

respondent failed to confine itself within the exceptions set out in section 26 of the Land Act; and

that the learned judge failed to appreciate the oral, pictorial and expert evidence adduced by the appellants on the existing ground measurement road reserve and beacons of 40 metres on their plots *vis-à-vis* the mutation forms. They continued that the trial court improperly concluded that the respondent's actions amounted to fair administrative action when neither prior notice was issued to the appellants nor the properties antecedently earmarked for demolition; that the appellants made significant submissions on the creation, operation and management of the respondent under the Kenya Roads Act but were disregarded by the trial judge; that the learned judge failed to appreciate the due and legal process followed by the appellants towards development of the plots; and the appellants were ordered to compensate the respondent for encroachment without any legal or justifiable basis. For those reasons, the appellants prayed that this appeal be allowed with costs to them by setting aside the impugned judgment and substituting the same with a judgement of this court.

9. The appeal was heard virtually on 3rd November 2025 in the presence of learned counsel Mrs. Mukira acting for the

appellants

while learned counsel Mr. Ragot represented the respondent. Parties relied on their respective written submissions that were orally highlighted.

10. Condensing the issues for determination, Mrs. Mukira conceded that demolition was not contested. However, the main issue for determination was whether the permitted road reserve stood at 40 metres or 60 metres. In her view, the road reserves stood at 40 metres and not 60 metres as the trial court found.
11. The appellants submitted that the trial court ignored their overwhelming evidence, and in the process, arrived at an incorrect finding. It was submitted that on the ground, the road reserve stood at 40 metres but however altered to 60 metres on paper. That the Registry Index Map (RIM) indicated that on one section the road was reserved at 60 metres and 40 metres on another section of it. Learned counsel for the appellants explained that when the beacon exercise took place, the road reserve was delineated at 40 metres by the Survey of Kenya. Mutation forms were produced to that effect. This was what formed the creation of

the title deeds issued by the appellants. In learned counsel's view, there was the possibility of human error on the disparity in figures.

12. The appellants advanced that they proved on a balance of probabilities that they were duly registered as proprietors of the suit land in line with section 26 of the Land Registration Act; a process that was not disputed by the respondent. They argued that their ownership rights were not and could not be extinguished as they were lawfully obtained. They were therefore entitled to the reliefs sought in their plaint.
13. They submitted that in view of the foregoing, the trial court erred in issuing declaratory orders of encroachment on a 20 metre road reserve as alleged by the respondent, despite its failure to prove the same. The effect of the order, they posited, was to create a *lacunae* on the legal implications on the sanctity of their titles. They emphasized that the evidence of **PW1**, **PW2** and **DW1** ultimately proved that there existed a 40 metre road reserve.
14. Citing the provisions of the Kenya Roads Act, the appellants

submitted that the respondent was a creation of the said statute. It was therefore not governed by the provisions of section 91 of the

Traffic Act as purported by the trial court. Furthermore, the respondent had no authority to manage, develop and rehabilitate the Nakuru-Kabarak road as it was not a national road within the meaning ascribed to the term under sections 2 and 4 (1), as read together with the first schedule, of the Kenya Roads Act.

15. In concluding the above, the appellants submitted that the respondent had no justification to demolish the structures in the appellants' properties. In their view, their actions, including the failure to give prior notice or earmark the properties, violated Articles 10 (2) and 47 (1) and (2) of the Constitution, section 4 (3)

(a) of the Fair Administration Act and section 49 (4) of the Kenya Roads Act. They further argued that the respondent acted in a discriminatory manner as it only demolished the appellants' structures and the neighboring properties that were in the same line. The appellant cited a number of authorities which we have read and will refer to, when necessary.

16. The respondent opposed the appeal. It filed written submissions dated 21st September 2025. To the respondent,

the broad issue for consideration was who between the appellants and respondent

was guilty of trespass as all the reliefs in the plaint and the counterclaim were based on that tort. The respondent urged this Court to consider whether the appellants had trespassed on the road reserve that led to the demolition of the structures. Put differently, the parties had diametrically opposed positions on the size of the road reserve with the appellants stating that it measured 40 metres whereas the position of the respondent was that the road reserve was 60 metres.

17. Dissecting the main issue for determination, as to whether the road reserve measured 40 metres or 60 metres, the respondent argued that no cogent evidence had been placed before the trial court by the appellants that the road reserve was 40 metres. The respondent questioned the veracity of the appellants' claim by observing that **PW2** could not point out the location of the properties when directed to the RIM. That the witness admitted that the original mother plots were not in the map. Furthermore, **PW3** confirmed that he never looked at the map and made the assumption that the road reserve was 40 metres based on his

assessment. Therefore, the appellants' allegation was without legal or justifiable basis as it was purely based on conjectures.

18. On whether the demolitions were malicious, the respondent submitted in the negative stating that the demolitions were lawful and in accordance with section 49 of the Kenya Roads Act. It stated that while many properties were found to have encroached, the respondent commenced the demolition process with the appellants' properties but could not proceed as a suit was filed impeding the process from continuing. It submitted that the award of Kshs. 10,000.00 against each appellant was discretionary and no argument was advanced to demonstrate that the discretion was exercised injudiciously.

19. We have carefully considered the parties' written submissions, examined the record of appeal and analyzed the law. The predecessor of this Court in **Kenya Ports Authority vs. Kuston (Kenya) Limited** (2009) 2 EA 212 explained our role as a first

appellate court in the following terms:

“On a first appeal from the High Court, this should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always

***bear in mind that it has neither seen nor heard
the witnesses and***

should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

20. The main issue for determination here is whether the trial court arrived at a correct or incorrect finding on the question of trespass and the demolition of the appellant's structures. Put differently the appeal succeeds or fails on one issue only: whether the road reserve was 40 or 60 metres. Once this issue is determined all the other grounds will fail or succeed.
21. It is not in dispute that the respondent is a creature of statute by dint of section 3 of the Kenya Roads Act. Section 4 (1) states that the respondent shall be responsible for the management, development, rehabilitation and maintenance of national roads. In discharge of the responsibilities set out in section 4 (1), section 4 (2) sets out the functions and duties of the respondent which include *inter alia*, controlling national roads and road reserves and access to roadside developments and performing such other functions related to the implementation of this Act as may be directed by the Minister.

22. In line with the above mandate, section 49 (1) of the Act provides as follows:

“Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority’s written permission or contrary to such permission—

a) erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;

b) make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or

c) give permission for erecting, constructing, laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in a building restriction area, or for any structural alteration or addition to any structure or other thing so situated.”

23. The bone of contention is whether the demolished structures were on the road reserve or not. The appellants testified that premised on the beacons erected on the parcels of land, the acreage of their parcels of land were properly determined. Furthermore, they used those beacons to ascertain that they did not encroach on the road reserve. **PW2**, a surveyor by profession, testified on behalf of the appellants that he conducted the mutation exercise giving rise to eight

subdivisions of the suit parcels of land. He stated that he

relied on the Registry Index Map (RIM) in sheet 2 of NJORO NGATA BLOCK 1 to prepare the two mutation forms.

24. According to **PW2**, he was emphatic that if the mutation exercise was not drawn to scale, the mutation would not have been approved. Thus, having been approved, it must have been accurate. He testified that the road reserve as captured in the mutation form was 36.5 metres. He noticed variances when he conducted the measurements as follows: from the showground to New Kiambu (block 1), the road reserve was 40 metres while from New Kiambu to Zaburi, the same reduced to 36.5 metres.

25. **PW2** was emphatic that the respondent had actually placed beacons to map out the road reserve. He added that the map did not show the width of the road reserve unless measured to scale. **PW3** a professional engineer, testified that the road reserve was not 60 metres as indicated in the map since it was physically measured at 40 metres by himself and **PW2**.

26. In sharp contrast to their testimonies, **DW1** testified that

according to the RIM, the road reserve measured 60 metres wide using the scale rule 1:5000. According to the cadastral plan, the

boundaries were affixed with coordinates giving more accuracy, to create the RIM of 1953. It was this cadastral map that **DW1** created a google map image. The cadastral map, giving rise to the RIM, in his view, accurately set out the coordinates and ascertained what is on the ground. It is on the basis of the cadastral map that the RIM was created.

27. These documents are public documents and made available at the survey office. It is also instructive to note that the authenticity of those documents was not questioned by the appellants. We have carefully read the record of appeal, the supporting documents and the submissions on this issue. It is our finding that the trial court properly arrived at the conclusion that the road reserve measured 60 metres based on the cadastral map, the RIM and the evidence of **DW1** who demonstrated to the trial court how he arrived at the figure by use of a scale rule. Accordingly, the trial Judge correctly held that the appellants encroached on the road reserve by 10 metres and we see no reason to interfere with those findings.

28. On the second limb raised by the appellants, it was testified by all witnesses that no prior notice or earmarking process was

embarked before the demolition exercise was carried out. Though **DW1** testified that the appellants were given notice, that was not backed up by documentary evidence. In a quest to answer the question, we find it useful to reproduce the contents of section 49

(4) and (5) of the Kenya Roads Act which provides as follows:

“(4) Where a person, without the permission required by subsection (1) or contrary to any permission given thereunder, erects, constructs, lays or establishes a structure or other thing, or makes a structural alteration or addition to a structure or other thing, an Authority may by notice in writing direct that person to remove the unauthorised structure, other thing, alteration or addition within a reasonable period which shall be stated in the notice but which may not be shorter than thirty days calculated from the date of the notice.

(5) If the person to whom a notice has been issued in terms of subsection (4) fails to remove the structure, other thing, alteration or addition mentioned in the notice, within the period stated therein, such item may be removed by the Authority itself which may recover the cost of the removal from that person.”

29. The appellants contended that based on the above provisions, the respondent illegally and unconstitutionally demolished the properties by not giving prior notice. The appellants fortified their submission with reliance on Article 47 of the Constitution

on the right to fair administrative action.

30. Looking at the provisions of section 49 of the Kenya Roads Act, a notice ought to have been given to the appellants to remove the illegal structures constructed on the road reserve. The question of notice and its rationale, meaning and tenor was elaborately dissected by this Court in **Kenya National Highways Authority vs. Tangerine Investments Limited** [2023] KECA 79 (KLR) that held as follows when addressing a similar issue:

“22. The use of the word ‘may’ in section 49(1) leave us with no doubt that the provision is obligatory. Therefore, the respondent was obligated under the said provision to seek and obtain permission from the appellant before erecting the bill boards.

.....
33. The respondent before us never complied with sections 49 of the Act, a statutory edict which prohibits erection of structures and other works on, over, and below roads or certain other land except as provided under sub-section (2) of the said provision which vests the appellant with the discretion, to give or refuse to give permission under the said section. Simply put, the respondent erected the bill board in total violation of the law. So serious is the failure to obtain such permission, such that Parliament section 49 (6) of the act created an offence. It reads:

“(6) A person who contravenes any of the provisions of sub section (1) commits an offence and is liable on conviction to a

term of imprisonment not exceeding one year or to a fine not exceeding one hundred thousand shillings, or to both."

34. Also, under section 91 of the Traffic Act such conduct also constitutes an offence. It reads:

“91. Encroachment on and damage to roads (1) Every person who, without the written permission of the highway authority— (a) encroaches on a road or on any land reserved therefore at the side or sides thereof by making or erecting any building, fence, ditch, advertisement sign or other obstacle, or by digging thereon or by planting or sowing any tree, shrub or seeds thereon; or... shall be guilty of an offence.”

35. So serious is the omission such that Parliament in two different enactments creates an offence arising from the same set of facts and circumstances. This is the background upon which the respondent approached the court and obtained equitable reliefs which are discretionary in nature.

36. Despite having failed to adhere to the law at the risk of facing criminal sanctions under the above provisions, the respondent approached the court and obtained equitable reliefs. In our view, the learned Judge erred in finding that the appellant’s decision was tainted with procedural impropriety. The respondent approached the court with unclean hands because he did not comply with the law in erecting the Billboards. He cannot claim that his fundamental rights were violated, his rights to a notice was anchored on his right to erect the bill boards. He had no right because he did not obtain the necessary authority. Therefore, he was not entitled to an equitable relief, or the exercise of the court’s discretion in his favour. (underline ours).”

31. Whereas no notice was given, it is not in dispute that the appellants did not have any right or prior permission from the respondent to erect structures on the road reserve. That is the fulcrum of the dispute herein. Had the appellants sought permission, that would have been a different route all together. He who comes to equity must come with clean hands. That was not the case for the appellants. They had encroached on the road reserve entitling the respondent to take the necessary action in the discharge of their mandate. Whereas section 49 requires that a notice be given and it ought to be given, the appellant was in contravention of the law and no claim on breach of a right can be based on an illegality. Accordingly, this ground of appeal also fails.

32. Lastly, the appellants complained that while other neighbouring properties had also encroached on the road reserve, the respondent discriminately demolished only their properties. We do not think that was the case herein. **DW1** confirmed that certain properties as per the documentation adduced had encroached on the road reserve but had not been demolished as it was an ongoing process that called for

measurement to ascertain whether the

properties had encroached on the road reserve and to what extent. This was, however not a demonstration that the appellants were targeted to the exclusion of the others. We find no credible basis/evidence to make a finding in favour of the appellants. That argument must fail.

33. On whether the trial court lacked the jurisdiction to determine the issue as being a boundary dispute, our answer lies in the negative. As correctly cited by the parties herein, section 18 (2) of the Land Registration Act prohibits a court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with the section. This was not the issue for determination herein. In this appeal and in the suit at trial, the question was whether the actions of the respondent were legal. This was to be determined by ascertaining whether the appellants had encroached on the road reserve, and not another parcel of land. The trial court thus was properly vested with the jurisdiction to determine the subject matter.

34. It is clear from the foregoing, that the appellants were the authors of their own misfortune. They ought to have consulted the respondent before embarking on a construction exercise when purchasing the properties. This Court thus ultimately finds that the present appeal lacks merit and it is dismissed with costs to the respondent. We so order.

Dated and delivered at Nakuru this 30th day of January 2026.

M. WARSAME

.....
JUDGE OF APPEAL

JAMILA

MOHAMMED

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

*I certify that this is a
True copy of the original
Signed*

DEPUTY REGISTRAR